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WHEN INTOXICATION INVALIDATES A WILL

The fact that a testator was intoxicated, or under the influence of some drink or drug, at the time he made the will, does not of itself avoid the disposition if the intoxicant or stimulus does not prevent him from comprehending intelligently what he is doing (Peck v. Cary, 27 N. Y., 9; Vreeland v. Westervelt, 45 N. J. Eq., 573).

A will of a drunkard is tested by the same rules as wills by other persons, and it will be upheld if, at the time, the testator knew the nature of his estate and his will and the natural objects of his bounty (Moriarity v. Palmer, 286 Ill., 96; In re Tifft's Will, 106 N. Y. Supp., 362), and this is so even in the case of habitual intoxication (In re Heaton's Will, 224 N. Y., 22).

This rule of law is recognized by all authorities as a sound one, for in all such cases the state of mind of the testator at the time of executing the will in question is the material issue, and if the testator be then in a condition to understand what he is about, his capacity is presumed (Peck v. Cary, supra). Accordingly, proof of habitual intoxication raises no presumption that incapacitating drunkenness existed at the execution of the will (In re Mannion's Estate, 95 Atl. Rep., 988).

In commenting upon this topic Schouler, in his work on Wills, Executors and Administrators (6th ed., vol. 1, sec. 169), states:

"On the other hand, the wills of those far gone in intemperate habits should be watchfully regarded; for such persons are even more liable to imposition in transactions of this kind than to dispose irrationally without dictation. If the mind is not clouded simply, but is actually deprived of reason or volition—if, in other words, whether by delirium or besotted faculties, or from any other cause the person at the time of executing the will is mentally incapacitated, according to the usual tests—his will is not a valid one."

An excellent statement of the general rule is found in the New York case of Peck v. Cary (supra), wherein it was said: "In order to avoid a will made by an intemperate person, it must be proved that he was so excited by liquor, or so conducted himself, during the particular act, as to be, at the moment, legally disqualified from giving effect to it." The court therein also quotes with approval a statement from Shelford on Lunacy (sec. 304), to the effect that "Consequently in cases of this description, all which is required to be shown is the absence of such excitement at the time of the act done as would vitiate it; for, under a slight degree of excitement from liquor, the memory and understanding may be as correct as in the total absence of any exciting cause."

A similar rule was laid down in the case of Ayrey v. Hill (2 Addams, 206), where the validity of the will of an habitual drunkard was in question. After stating the difference between the derangement from intoxication and ordinary lunacy, the court added, "Whether, where the excitement, in some degree, is proved to have actually subsisted at the time of the act done, it did or did not subsist in the requisite degree to vitiate the act done, must depend, in each case, upon a due consideration of all the circumstances of that case itself, in particular; it belonging to a description of cases that admits of no definite rule."

In such cases it is competent, as is the universal practice in all the probate courts, to examine the dispositive parts of the will to see whether the dispositions are extravagant and unreasonable, on the one

hand, or whether, on the other, they are such as might probably be expected from one in the situation of the alleged testator. The question is not, however, whether the gifts are such as, upon the whole, would have been advised under the same circumstances, but whether there is such a violent departure from what would be considered proper and natural, that they cannot fairly be referred to any cause other than a disordered intellect.

An interesting recent case in which the facts called for the application of the rules herein outlined is Matter of Henry J. McGuckin (N. Y. Law Journal, October 16, 1925). In that case the probate of the testator's will was contested in part upon the issue of testamentary capacity. It was alleged that the testator was an habitual drunkard, so much so that he was incapacitated from executing a will. The surrogate, after a review of the evidence introduced by the proponent as well as the contestant, and also after taking into consideration the personal appearance and testimony of the testator before him in another matter only a few months previous, came to the conclusion that the evidence negatived any finding that the testator was of unsound memory and judgment at the time of the execution of the will. His decision is in accord with the rule stated above, to the effect that "habitual and extreme intoxication is not in and of itself evidence of, or does not constitute, an unsound mind or testamentary incapacity."

The opinion of Mr. Surrogate Foley reads as follows:

"In this contested probate proceeding the testimony clearly establishes the lawful execution of the will, the soundness of mind of the testator and his freedom from undue influence. The contestant utterly failed to establish any proof of undue influence, coercion or fraud in the procurement of the will (Matter of Ruef, 180 A. D., 203, aff'd 223 N. Y., 582). Upon the issue of testamentary capacity there is some evidence of drunkenness before and after the execution of the will on June 12, 1925. 'Habitual and extreme intoxication is not in and of itself evidence of or does not constitute an unsound mind or testamentary incapacity. There must be the additional proof that at the time of the testamentary disposition the natural intelligence, memory and judgment were paralyzed or perverted or the power of volition inactive because of the intoxication.' (Matter of Heaton, 224 N. Y., 22, at p. 29). So in the present contest the testimony of the subscribing witnesses, and the witnesses called by the contestant, convincingly shows that the testator was clear in mind and not under the influence of alcoholic liquor when the will was signed by him. The evidence of the contestant's witness, Mr. Kinney, especially supports this conclusion. Two of the subscribing witnesses are attorneys of standing and experience. The other is a reputable business man without any interest in the outcome of this litigation. The prior will executed on March 5, 1925, discloses the same general testamentary scheme contained in the will contested here. Between March 5 and June 12 the testator appeared personally before the surrogate upon hearings in a contested accounting proceeding held on April 28 and May 7, 1925. He testified therein intelligently, with an ample appreciation of the nature of the proceeding, and a fair recollection of his transactions with his adopted son (the contestant here). In that proceeding he gave every indication of possessing the requisites of mental competency. The bad feeling which arose between father and son in that proceeding sufficiently explains the disinheritance of the contestant. The will is admitted to probate. Submit decree on notice accordingly."—The New York Law Journal.

Photographer (taking picture of father and college son): Perhaps it would look better if you put your hand on your father's shoulder.

Father: It would be more natural if he put his hand in my pocket.

NOTES OF IMPORTANT DECISIONS

SECRETARY OF STATE'S CERTIFICATE NOT CONCLUSIVE PROOF OF TITLE TO AUTOMOBILE.—The Appellate Court of Indiana, in Meskiman v. Adams, 149 N. E. 93, holds that the Secretary of State's certificate of title to an automobile is not conclusive proof of title, and may be collaterally attacked. Said the court:

"Appellant insists that the certificate issued to her by the secretary of state was sufficient proof of her title; that such certificate is conclusive proof of her title, and cannot be collaterally attacked. Appellant seeks to give the same force and effect to the certificate issued by the secretary of state under the automobile law as are given to patents for lands issued by the national government. We cannot concur in this contention. Such patents convey title. Not so with a certificate of title issued by the secretary of state for an automobile."

BENEFICIARIES—THE LAWRENCE v. FOX DOCTRINE.—The Supreme Court of Pennsylvania has recently held, in the case of Tasin v. Bastress (130 Atlantic Rep., 417, Advance Sheets of October 29, 1925) that the fact that the plaintiffs in a contract action were absolute strangers to a compromise agreement made between other parties for their (plaintiffs') benefit, does not preclude them from suing upon the agreement in their own names. The court below had held that plaintiffs could not sue because they were not in privity to the contract itself, and because no consideration moved from them to the defendant. The Supreme Court of Pennsylvania, however, pointed out that if this argument were sound a beneficiary would never be allowed to sue in his own name, for he is always "a stranger to the contract," and because the consideration does not move from him.

In England the beneficiary doctrine, which had its origin in Dutton and Wife v. Poole (2 Levinz, 211), was in effect abrogated and wiped out even on the facts of that case, in 1861, in Tweddle v. Atkinson (1 Best & Smith, 393). That in England today the doctrine is discredited and repudiated has been recently reaffirmed by the House of Lords (Dunlop Pneumatic Tyre Co., Lim., v. Selfridge & Co., Lim., 1915, App. Cas., 847, esp. 852-5). The Massachusetts courts in this country follow the present English rule (Mellen v. Whipple, 1 Gray, Mass., 317; Borden v. Boardman, 157 Mass., 410). In the case last cited the court squarely held that there is no cause of action in favor of "a third person, who is not a party to the agreement, and from whom no consideration moves." In most American jurisdictions, however, the rule is otherwise (see Williston on Contracts, Vol. 1, sec. 368, et seq.; Anson on Contracts, Corbin edition, chap. 9; 27 Yale Law Journal, 1008).

In New York a beneficiary has been permitted to recover, provided there is a legal or equitable obligation owing by the promisee to the beneficiary, ever since the leading case decided in 1859 by the Court of Appeals (Lawrence v. Fox, 20 N. Y., 268). In that case one Holly owed the plaintiff $300. The defendant Fox owed Holly $300 for a loan. Defendant agreed with Holly to pay $300 direct to the plaintiff Lawrence. Defendant broke his promise; plaintiff brought suit against defendant thereon. The court gave judgment for plaintiff. It should be carefully observed that there was a legal obligation, to-wit, a $300 debt, owing by the promisee Holly to the beneficiary, plaintiff Lawrence.

Lawrence v. Fox (supra) was confined to its exact facts for many years (Vrooman v. Turner, 69 N. Y., 280, decided in 1877; Durnherr v. Rau, 135 N. Y., 219, decided in 1892). In the last case cited Judge Andrews, writing for the court of Appeals, said: "The application of the doctrine of Lawrence v. Fox (20 N. Y., 268) to this case would extend it much further than hitherto, and this cannot be permitted in view of the repeated declarations of the court that it should be confined to its original limits" (see also Buchanan v. Tilden, 158 N. Y., 109, 1899).

A sole beneficiary, however, was permitted to recover despite this limitation. Thus, in Todd v. Weber (95 N. Y., 181, decided in 1884), a bastard child, who was not a party to a contract, was permitted to sue thereon, since it appeared that the same was entered into for her sole benefit. The court said: "As she had the sole beneficial interest in the contract" the suit was correctly brought in her name. This might be justified either under the close relationship basis of Dutton v. Poole (supra) as early expounded in England, or on the sole beneficiary theory (see Anson on Contracts, Corbin edition, pp. 338-340).

In Pond v. New Rochelle Water Co. (183 N. Y., 330), decided in 1906 by the Court of Appeals, some very general language was employed by the court, and the court approved "the *broad* principle that if one person makes a promise to another *for the benefit of a third person*, the third person may maintain an action on the promise." The early English case of Dutton v. Poole was cited by the court with approval, and without any mention of the circumstance, probably by inadvertence, that Dut-

ton v. Poole had been overruled and repudiated in England, where it originated (see also Smyth v. City of N. Y., 203 N. Y., 106; Seaver v. Ransom, 224 N. Y., 233, 1918). The broad doctrine of Seaver v. Ransom has been approved by Cardozo, J., in his works on "The Nature of the Judicial Process" and "The Growth of the Law." In Seaver v. Ransom (supra) an agreement was made between a married couple for the sole benefit of the niece of one of them, and the Court of Appeals, writing by Judge Pound, held that the niece was entitled to sue on the agreement. This readily can be justified on the ground that a *sole beneficiary* should be permitted to enforce the contract. The overwhelming weight of authority has so held, including the Supreme Court of the United States (National Bank v. Grand Lodge, 98 U. S., 123). Where there is also relationship by blood or marriage, of course, plaintiff's case is even stronger.

In the Pennsylvania case above referred to it will be observed that the beneficiaries of the agreement, the plaintiffs, were the only persons who could be substantially benefited by the promises contained in the agreement, and the court held that they therefore should be allowed to recover, which forecasts for Pennsylvania, as the court quite frankly said, "a movement in accordance with the general opinion."—New York Law Journal.

A Scot applied for a position as patrolman on the London police force. Here is a question they put to him in Scotland Yard and his answer:

"Suppose, MacFarland, you saw a crowd congregated at a certain point on your beat, how would you disperse it, quickly and with the least trouble?"

"I would pass the hat."

The stock salesman, after painting a beautiful word picture, said: "Now, Mr. Jones, you know this company hasn't got a dollar's worth of watered stock in it. How much are you going to buy?"

"Young man," he said, "the next stock I buy is going to have four legs, and I will water it myself."

"I understand Crimson Gulch has passed an ordinance forbidding any citizen to buy bootleg liquor from Snake Ridge."

"Yep," answered Cactus Joe. "The Gulch is their only market. If them Snake Ridgers have to drink their own stuff there won't be any of 'em left in six weeks. We're goin' to put that there iniquitous village on the map, but we want to proceed lawful and strategic."—Washington Star.

NEW LAMPS FOR OLD

By Wm. Seton Gordon of the New York Bar

We lawyers as a profession have never been what you might call popular with the great body of our fellow citizens. We have never exactly been loved for ourselves alone. Jack Cade, who represented pretty fairly the views of the man in the street in his time, set out to reform existing social conditions and, as a starter, proposed to hang all the lawyers. History records that this atrocious sentiment met with warm, even tumultuous, popular approval. It has never much changed in the intervening centuries. Ask today any old hick farmer, smoking his corncob with his number elevens planted on the stove in the country store, if he knows of any trick too mean or low down to play off on a lawyer and he will answer, with feeling, that he certainly does not. Upon us, as upon the unappreciated actor whose appearance on the boards is a signal for a bombardment of spoiled eggs, wilted cabbages and dead cats, it is beginning to dawn that the public is not precisely a unit in valuing our humble efforts at their true worth.

Even our own have abused us. Chief Justice Taft, as long ago as his presidency, declared in a public address that our administration of criminal law was a crying disgrace and a stench in the nostrils of the entire civilized world; that the way we disposed of civil business was absurd, wasteful and about a hundred years behind any other present-day nation; and said other unpleasant things about us. Leaders of the Bar tell us that our law of evidence is a crazy-quilt of inconsistent patches, some of which represent an environment already passed and done with a century ago. Even the stage jibes at us; and Hamlet, in his bill of particulars filed when called on to show cause why he should commit suicide, found it necessary

to allege the Law's Delays high up in his list of the intolerable ills of life.

Must We Plead Guilty?—The indictment is serious enough to warrant our careful looking into. If we allow this sort of thing to go on much longer we shall get a bad name. Some merry mob, like the fun-loving inhabitants of Herrin, Ill., the next time they start in to burn their court-house, will hang such of us as they may find in the neighborhood, just out of pure sportiveness. Why are the community always picking on lawyers? Gentlemen (even if Modernists) do not yet shoot ministers in the pulpit who are doing their best, nor do they apparently feel it a duty to the public to assassinate doctors on the open street. The prejudice, then, cannot be of the Bolshevik pattern against intelligentsia and high-brows generally who were believed in Russia to require thinning out.

The Law's Delays—Let us, as briefly as we can, examine some of these causes of complaint. First (since the subject worred Hamlet), of the law's delays. Beyond question delays, unnecessary yet largely unavoidable, arise from (a) purposely deliberate procedure and defensive tactics in preparing a case for trial; (b) overburdened trial-calendars; (c) appellate courts and re-trials. To clear the ground, let us dismiss the first by saying that three months should (and do in most cases) suffice to settle pleadings, ascertain issues of fact and law and prepare the testimony on both sides. It is not at this stage that the deadly delay occurs. It is usually first encountered when the action comes to be set down for trial and is then likely to affect a jury case more than an equitable or non-jury issue.

Where Delay is Really Formidable—The congestion of trial calendars is worse in our great urban centers than throughout smaller towns; but it is precisely in metropolitan cities that the most important matters in litigation are likely to be met with. In the federal courts, the calendars not long ago showed 44,000 cases awaiting trial and some of them had stood already as long as three years. Last spring, in the New York City Trial Terms of the Supreme Court, about 40,000 cases remained untried. At present, if you enter a case for jury trial in New York County, kiss it good-night; for it may go to sleep for two years good. The patient little crocus may not push its way up from where it lies so snug until the snows of the third winter have melted.

Results of Delay in Trial—To delay the trial of any case for any such lengthened period amounts to a simple denial of justice. In the two or three years it is held up, some witnesses die, some remove to distant states. Others become hazy in their recollection of the facts. Perhaps Brother Simpson, who represents your opponent, always benevolent and thoughtful of others as he is, may prepay their passages home to Naples or Budapest—a trip solely for the benefit of their general health. You yourself may mislay important exhibits or even forget what the bally dispute is all about. After you inform your client that you have set his case down for trial, he generally calls in two or three times, reminding you that he cannot keep his witnesses together very long. You say, evasively, but with a heartsick glance at a printed trial calendar which has long since assumed the portly dimensions of a telephone directory, "Pretty soon now." After six months of occasional visits, he gets cross and phones you angrily, "Are you ever going to try that case?" Of course he blames *you*, not the up to-date system you work under. After a while his mood changes to one of sulky suspicion: he thinks you either must be prevaricating about it or the other side has bought you off. Any way, at the end of a year of useless waiting, he takes away all his business from your office and sends you word that the next time you catch him

going to law you can write home about it. Perhaps he himself moves to the Pacific Coast and when the belated old rest-cure (as it appears to him) which you call a court barges along to his case, he is happily settled down in a new business in Hollywood and sends you a collect night letter to go H—arlem and try the case yourself: that he long since became sick of waiting and has washed his hands of the whole business.

From his practical point of view, he is quite right. Of what value to him is a decision four years late to start with; to say nothing of appeals such as our practice permits?

Do you take in how unpractical and valueless in this age of *get-there* all this dilatory flim-flam appears to a man trained to modern business methods of promptness, precision and practical utility? Would payment of every bill of exchange four years after its due-date be deemed of any use in the business world? Could the great commercial enterprises of the country be conducted on any such shilly shally, dot-and-go-one basis? Could the nation-wide operations of railroads, telegraph, telephone and express companies, steamship lines or any other of the multitudinous public utility services rendered the community by business men, be run in such a crazy fashion?

The Bench Not Responsible—What are the causes of the lamentable incapacity of Courts to keep up with their work? Not to the Bench may we charge it. More especially in the great commercial centers where congestion is at its worst, judges toil early and late, and we all know instances where they have fallen by the wayside victims to tasks beyond their strength. There are too few of them. The obstacle of providing more is chargeable to a public which is not yet alive to the actual dollars and cents' loss incurred by reason of impeding litigation; compared to which the salaries of sufficient additional judges to handle the work is absolutely negligible. A very distinguished writer, quoting the instance that England, with fewer judges per thousand of her population, suffers from no court dedays, is of opinion that we should speed up with what judges we have. This view, however, overlooks the fact that we are confronted by American, not English, conditions. The parsimonious public, which sins more from ignorance than wilfulness, may in time also learn that to procure the very highest quality of judicial output, served as promptly (and it could and should be) as the morning's milk, no judge should be overworked. At no distant day our people will study this subject as carefully as they now study the different breeds of Holstein or Jersey cattle in the scarcely more important department of providing safely potable milk. The ideal judge ought to be a man of leisure with ample time allowed him for study and reflection; for he must be afforded the opportunity to keep abreast of the world's best thought in all matters relating to public and private law, legislation, sociology and politics. All may come within the scope of his daily work. Mental processes cannot safely be hurried. A working carpenter may saw a few planks and hammer together a table in the eight-hour day to which his trade-union rules limit his activities. But to unravel a tangled skein of contradictory testimony, picking out the golden threads of the true from the coarser strands of the obviously false, setting apart the governing facts and arranging all in proper order and sequence so as to lead the mind to the right conclusion, is a trifle more difficult than making a table; although the general public may not as yet understand this, or even accept it when told them. It is only we lawyers who appreciate how vital it is to the commonwealth that the judge's output should be of superlative quality. In virtually making law for us, he orders and governs our very lives as no king of old

ever did. Turned by the pebble's edge of his opinion, the current of judicial decision may sweep to the peaceful sea of national content or stray off toward the frozen tide of rebellion and anarchy.

No Occasion for Delays—The Bar have always known, and the public are now learning, that there is not now and never was any occasion for either the law's delay or the shocking loss that attends it. If a lawyer were by training as practical as an engineer, we should never hear any complaint about it. Lawyers, priests and poets are not practical men. The men who built the great bridge over the Delaware at Camden first sat down and figured what material and labor they required to complete the work in hand and they carried out on schedule time. If we knew our work as well as the engineers know theirs, the congealed calendars would melt like snow-banks in an April sun. A litigant should be able to have his case tried the same week he sets it down for trial: and that's all there is about it.

Delay in Appeals—Along about the time of Andrew Jackson, some visionary theorist of the arm-chair variety got into his head the specious idea that it was in the interest of poor litigants to allow appeals freely, since this would afford a natural protection against the malefactor of great wealth. This totally unfounded notion has been the cause of much injustice and suffering. What the poor litigant needs most of all is promptness and finality of decision. He has neither the time nor the money to waste in litigation. If appeals are freely allowed, he is no match for his antagonist who pays his lawyer by the year. The Malefactor of Great Wealth, by appealing every petty interlocutory order, kicks him all around the lot and lands him in the poorhouse.

The Fetish of the Civil Jury—Like nearly every other time-worn specimen in our legal museum of antiquities, the jury in civil cases represents something once useful but now largely obsolete. In England, it has been almost entirely discarded. The issues of modern lawsuits tend to become increasingly complicated. Not to put too fine a point on it, the average juryman is no longer sufficiently educated to understand and decide upon every case presented to him. To elaborate this, let us take quite an ordinary case, say an action for damages arising from an elevator accident involving loss of life, where the issue of negligence will depend on understanding the testimony of expert witnesses requiring for its complete comprehension more than a nodding acquaintance with the science of mechanics and machine construction, applied mathematics and a few general arts thrown in. Watch the jury when this scientific testimony is being offered and note the vacant expression on their faces. They probably do not understand one-half the technical terms unavoidably employed. It is not that they are inattentive or unwilling to grasp what is said. They are simply unfitted by lack of education. Recognizing difficulties which are obvious in many cases, the old and reasonable practice in England, in our Federal Courts and in some state courts, permits the presiding judge to sum up the testimony and to classify, arrange, explain and give the jury the benefit of his opinion upon it. This is of great assistance to them. Not only is the judge the single independent man in court capable of unravelling testimony, smoothing out its kinks, presenting it in proper sequence and generally rendering it understandable, but his long experience in surveying witnesses in the box (a substantial proportion of whom rarely injure their health permanently by too close adherence to the truth) tells him, by acquired instinct, what testimony to believe and what to reject. But in the majority of states a short-sighted policy denies to the presiding judge any right to comment on testimony. The verdict is often a gamble. It may be the resultant of a dozen differ-

ent cross-currents of odd, unlooked-for theories, prejudices arising from race, creed or class; or mere temporary whim or sentiment. Judge Spiegelberg, of the Municipal Court of New York, an acute observer, notes that verdicts today are usually fifty-fifty compromises and often display a supreme contempt for such foolishness as the true measure of damages with which the Bench may try to impress the twelve good men and true. There has always been something sacrosanct about the largely hap-hazard verdict of twelve men in a box which appears to render it superior to the product of a single trained legal mind. We blink at it like an owl in the sunlight, but dare not lay hands on it.

The Public Prefer Arbitration—Modern business men have long since recognized that the civil jury is a prize-packet affair and they fight shy of it. The Federal Arbitration Law came into force January 1st. It followed the similar state laws of New York and New Jersey. Within a very few years the Uniform Arbitration statute is safe to be adopted generally by all the states in turn. The movement is a long overdue protest against the rickety machinery we lawyers have hitherto set up for the settlement of commercial disputes. It evidences the nation-wide distrust of the business world in courts. From this time on, commercial people have high-speed, economical and effective tools and machinery under their own control for settlement of their business disagreements. They roll their own. It certainly constitutes one way of lightening hitherto everburdened trial calendars which, left to ourselves, we could discover no means of relieving. It lightens the overhead expenses of all business. Incidentally it lightens our pocket-books as well.

Hotel Clerk: "Why, how did you get here?"
Hard Egg: "I just blew in from Montana with a bunch of cattle."
Hotel Clerk: "Well, where are the rest of them?"
Hard Egg: "Down at the stockyards. I ain't as particular as they are."—Yellow Jacket.

COMMERCE—SAFETY APPLIANCE ACT

NEW ORLEANS & N. E. R. CO. v. JACKSON

105 So. 770

(Supreme Court of Mississippi, Division B. Nov. 2, 1925.)

Within federal Safety Appliance Act, § 2, as amended (U. S. Comp. St. § 8618), carrier's switchman was injured by defective handhold on car "hauled or used on its line," making it liable irrespective of negligence, the car when delivered to it, in the course of interstate trip, for transportation to the end of the trip being found to be in bad order and in need of repairs, and the accident occurring while the car, after being placed in carrier's repair yards on the "shop lead" track, was being "spotted" on a repair track; it being repaired without being unloaded, and continued on its trip the day after its arrival at the station; the stopping in the yards being simply a step in interstate commerce.

Bozeman & Cameron, of Meridian, for appellant.

M. V. B. Miller and Reily & Parker, all of Meridian, for appellee.

ANDERSON, J. This action was brought by appellee, Grant Jackson, in the circuit court of Lauderdale county against appellant, New Orleans & Northeastern Railroad Company, for damages for personal injuries sustained by him through the alleged negligence of appellant while employed by appellant as a switchman in its yards at Meridian. Appellee was awarded judgment for $10,000, from which judgment appellant prosecutes this appeal. The trial court directed a verdict for appellee on the question of liability, and submitted alone to the jury the question of damages.

The appellant contends that the court erred in peremptorily instructing the jury to return a verdict in favor of appellee on the question of liability. In determining the propriety of such an instruction the evidence must be taken most strongly against appellee. Every material fact which the evidence proves, or tends to prove, in favor of appellant, either directly or by reasonable inference, must be taken as established. So, viewing the evidence, the following case was made:

Appellee's declaration alleged, and the evidence showed, that, when appellee's injury took place, appellant was engaged in interstate commerce, and appellee was employed in like commerce. Appellee, a negro switchman in appellant's yards, was engaged with his crew in pushing a cut of 18 bad order cars onto a repair track at appellant's shops, and in spacing, or

spotting, the cars on this track for the convenience of car repairers. The appellee climbed up on top of the cut of cars in order to pass signals, and in climbing down from one of the bad order cars in the cut he pulled off a handhold which was on top of the car, and fell to the ground, breaking his leg, and receiving other injuries.

The trial court instructed the jury that appellant was liable for the injury on the theory that the federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.) applied. Appellee seeks to justify the instruction alone because that act applies; and, furthermore, it is clear from the record in the case that the instruction can be justified alone on that ground. The applicable provision of the act is in this language:

"Sec. 2. That on and after July first, nineteen hundred eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: * * * Secure handholds or grab irons on their roofs at the tops of such ladders." Section 2, 27 Stat. 531; chapter 196, U. S. Comp. St. § 8606, as amended by Act of April 14, 1910, 36 Stat. 298, c. 160, U. S. Comp. Stat. § 8618.

Appellee's contention was that the evidence showed appellant was guilty of a violation of the Safety Appliance Act, and therefore liable for appellee's injury without regard to any question of negligence or assumption of risk. The evidence did establish without conflict that a defective handhold on the car caused appellee's injury. The trial court adopted appellee's view, and therefore directed a verdict in his favor. If appellee's contention be correct, the court committed no error in so doing.

Appellant's contention was that the movement of the defective car at the time and place of the injury did not bring the case within the terms of the Safety Appliance Act, but that the case was governed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and therefore negligence on the part of appellant causing the injury had to be affirmatively shown by evidence; that the question of negligence was one for the jury. Appellant's position is that at the time and place of the injury the defective car causing appellee's injury was not being "hauled" or "used" "on its line," and hence the Safety Appliance Act did not govern.

The bad order car causing the injury was a W. & T. car, No. 327, loaded with lumber, moving from Oneta, Tenn., on the Cincinnati, New Orleans & Texas Pacific Railroad and its connecting lines to Meridian; thence over appellant's line of railroad to New Orleans, La. The car arrived at Meridian in an extra freight train over the Alabama Great Southern Railroad on April 13, 1923, at 4:45 p. m. On arrival at Meridian it was found to be in bad order and in need of repairs. It was repaired in the repair yards of appellant at Meridian on April 14, 1923. It was while the car was being spotted on a repair track for the convenience of the car repairers that plaintiff was injured. After the car was repaired, it was carried to New Orleans by appellant, leaving Meridian at 11:15 on the 14th of April, 1923. The car was not unloaded; it came into Meridian and into appellant's repair yards loaded with lumber, and, after being repaired, was carried by appellant to New Orleans, without the load having been disturbed.

The Alabama Great Southern Railroad Company and appellant maintained joint yards at Meridian; the switching in these yards being done by a joint crew of the two companies. Near these switching yards, but wholly separated from them, appellant, in connection with its railroad shops at Meridian, maintained repair tracks and yards which were devoted exclusively to the repairing of bad order cars. After this bad order car had been inspected and tagged as such, it was taken out of the Alabama Great Southern train of which it was a part, and placed in appellant's repair yards on a track known as the "shop lead," together with 17 other bad order cars, and was standing on this track when appellee and his crew came on duty at midnight on April 13, 1923. There were some eight or more repair tracks running off from this shop lead, and standing upon some of these repair tracks were bad order cars which had been repaired during the preceding day, and were ready to be used or forwarded. Among the duties appellee and his crew performed as employes of appellant was that of shoving bad order cars standing on the shop lead onto one of the repair tracks, and to separate, or space, or spot each of the cars so that the car repairers could pass around them and conveniently make repairs. It was during such a movement that appellee was injured. After the cars were repaired, it was the duty of the appellee and his crew to pull them out of the repair tracks over the shop lead and distribute them as directed by the switching list.

The Supreme Court held in T. & P. Railway Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874, that a switchman in the employ of an interstate railway company who was injured through a defect in the handhold or grabiron forming one of the rungs of a ladder on a box

car which he was descending, after having set a brake operated from the roof of such car, was within the protection of the Safety Appliance Act, although the employe, when injured, was engaged in taking the defective car to the shops for repairs. In that case the bad order car had been standing on a spur track perhaps a month awaiting repairs. The car was being switched to the shops for repairs. It was during that movement that the injury complained of occurred. Among other things, the court said:

"The defendant in error, Rigsby, while in the employ of plaintiff in error as a switchman in its yard at Marshall, Tex., was engaged, with others of the yard crew, in taking some 'bad order' cars to the shops there to be repaired. The switch engine and crew went upon a spur track, hauled out three cars, and switched them upon the main line, intending to go back upon the spur track for others, to be taken with the three to the shops, which were on the opposite side of the main line from the spur track. Rigsby, in the course of his duties, rode upon the top of one of the cars (a box car) in order to set the brakes and stop them and hold them upon the main line. He did this, and while descending from the car to return to the spur track he fell, owing to a defect in one of the handholds or grabirons that formed the rungs of the ladder, and sustained personal injuries. This car had been out of service and waiting on the spur track for some days, perhaps a month. * * * It was admitted that the main line of defendant's railroad was in daily use for the passage of freight and passenger trains in interstate commerce. * * *

"It is argued that the statute does not apply except where the car is in use in transportation at the time of the injury to the employee, and that since it does not appear that the car in question was in bad order because of any negligence on the part of the railway company, and it was being taken to the shop for repairs at the time of the accident, there is no liability for injuries to an employe who had notice of its bad condition, and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in Great Northern R. Co. v. Otos, 239 U. S. 349, 351, 36 S. Ct. 124, ante [60 L. Ed.] 322, 323, where it was pointed out that although section 4 of the Act of 1910 [U. S. Comp. St. § 8621] relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment. * * *

"The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the 'bad order' cars in place on that track would have been obviously dangerous to through traffic; while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained.

"But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the act in its remedial aspect as broad an application as was accorded to its penal provisions in Southern R. Co. v. United States, supra [222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72]."

It will be observed that in that case, in order to get the bad order car which caused the injury from the switch track, where it had been awaiting repairs for some time, to the repair yards, it had to pass over the main line of defendant's railroad, and, while the car was on the main line, the injury complained of occurred.

It is true the court said that, while so situated, a failure to set the brakes so as to hold temporarily the bad order car in place on the track would have endangered through traffic; and, furthermore, that an injury to the brakeman would have had a tendency to delay the clearing of the main line for through traffic; and that perhaps upon the mere ground of the relation of the plaintiff's work to the immediate safety of such traffic on the main track his action might be sustained. But the court went further and distinctly held that it was unwilling to place its decision upon so narrow a ground, because there was no constitutional obstacle in the way of giving to the Safety Appliance Act in its remedial aspect as broad an application as was accorded its penal provisions, and that the Safety Appliance Act applied, and the railroad company was liable to the switchman for his injury.

Appellant argues that there are material differences between the facts in that case and those in the present case; that in that case the bad order car causing the injury, although being moved from a side track, where it had been for perhaps a month awaiting repairs, to the repair yards, was at the time of the injury on the main line, which was a step in its movement; while in the present case the movement of the bad order car causing the injury was alone from the shop lead track, which was an

instrumentality of the repair yards, to one of appellant's repair tracks. Although that difference in the facts of the two cases exists, we think, considering the reasoning of the Supreme Court, that the plaintiff in that case would have been permitted to recover, even though the injury had occurred on one of defendant's tracks leading into the repair yards and not on its main line.

In Great Northern Railroad Co. v. Otos, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322, the facts were substantially as follows: The plaintiff was a switch foreman engaged in breaking up a train that had come into the state of Minnesota from the West. At the moment when he was injured he had three cars attached to a switch engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The automatic coupler on the Minneapolis car was out of order, and needed repairing, and had been marked for repairs, and was to be switched to the repair track before going farther. In the switching operation, the plaintiff being unable to uncouple the Duluth car from the side without going between the cars, because the pin lifter was missing, did so while the cars were moving, and was injured. The court said, among other things:

"The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the act of March 2, 1893, c. 196, § 2, 27 Stat. 531, Comp. St. 1913, § 8606, does not apply; that if it does apply, the defendant was required by that act and the supplementary act of April 14, 1910, c. 160, 36 Stat. 298, Comp. Stat. 1913, § 8617 [8618], to remove the car for repairs, and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was a person intrusted by it with the details of the removal, and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument cannot prevail. The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the act of Congress. Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590."

It will be noted that the court said that the car had been loaded to be carried to Minneapolis; in fact, was carried there the next day; that it had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination.

In Delk v. St. Louis & S. F. R. R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590, the court held that a freight car loaded with interstate freight, and placed on a side track in the railway yards at its destination to await repairs to the automatic coupler, was being used in moving interstate commerce within the meaning of the Safety Appliance Act when a coupling with another car was attempted by the carrier's order during switching operations.

Since the decision of the Rigsby, Otos, and Delk Cases by the Supreme Court of the United States, we think but little aid can be obtained in considering the decisions of the lower federal courts and state court of last resort construing the Safety Appliance Act, in view of the fact that the decisions of the Supreme Court on this subject are controlling on all courts, state and federal. Although neither of those decisions of the Supreme Court of the United States is directly in point with the case here on its facts, nevertheless we are of opinion that this case comes within the terms of the act which is not to be strictly construed, but, being a remedial statute for the benefit of railroad employes and the traveling public, is to be construed so as to accomplish the purpose for which it is intended.

It is true that, while the car on which appellee was injured was not, at the particular time of the injury, actually moving in commerce, nevertheless the stopping of it under the circumstances in appellant's repair yards at Meridian, in our opinion, was simply a step in interstate commerce. The car came into Meridian loaded. When its bad order was discovered it was switched into appellant's repair yards, with the same load, where it was repaired, without being unloaded, and went out in a few hours on its journey to its destination. It cannot be said with reason that the car had ceased to be a commercial car. The evidence fairly shows that appellant had received the car, not primarily for repairs, but for transportation; that the necessary repairs were made that the car might be carried by appellant to its destination. The repair of the car was mere incident. The dominating thing was the carrying of the car by appellant over its line of road to New Orleans. We think not only the language of the Safety Appliance Act applies to the facts of this case, but they come within the reason and purpose of the act. It follows from these views that the trial court did not err in directing a verdict for appellee on the question of liability.

Appellant assigns as error intemperate argument made to the jury by one of appellee's attorneys, who was the district attorney of the district in which this case was tried. Appellant urges that this argument was of such a character as was calculated to bring about the verdict that was rendered; that it was prejudicial and harmful to the rights of appellant. The argument in question was the closing argument in the case. The attorney making the argument made the following statements to the jury to which appellant objected, which objection was overruled by the court and the action of the court excepted to by appellant: That the law violated by appellant which caused appellee's injury "was the same as the law against murder and against rape, in fact, this is nothing but murder"; that Congress did not pass the Safety Appliance Act "to help this poor devil (referring to appellee); they passed it because so many mothers' sons were being slaughtered by the railroad companies—more than were killed in the war—and they had to put a stop to it"; that he wanted the jury to give appellee "a good verdict because lawsuits are expensive, and they (meaning appellant) made him sue, and you ought to give him a good verdict because they made him file this suit." (There is no evidence in the record to sustain this statement of fact.) Referring to the fact that appellant's attorney continued to object to this character of argument, appellee's attorney said further:

"You have all plowed a little old mule in the sun all morning and got his back sore and then thrown the saddle on him to ride to the ball game. You've seen the saddle pinch him and seen the little old mule twist and wiggle because it pinched. He (meaning appellant's attorney) keeps on excepting to my argument because it pinches."

Appellee's attorney stated to the jury further that appellant "took two X-ray pictures of plaintiff's leg; one at the time of the first injury and one at the time of the second injury (injury from falling after original injury). Where are those pictures? They didn't bring them up and show them to the jury." (The record shows no evidence that X-ray pictures were taken.) Appellant's objection to this latter statement was sustained, and the court instructed the jury to disregard it.

We cannot say, judging alone from the size of the verdict in this case, that it is so large as to evince passion or prejudice on the part of the jury, but it is large in our opinion for the injury done. And this argument by appellee's attorney which was permitted and thereby approved by the court probably had great influence with the jury in fixing the amount of their verdict. It was certainly calculated to have that effect. The statements of fact and argument of appellee's attorney amounted to a palpable appeal to the passions and prejudices of the jury. And there went with it the fact that the attorney making the argument held the high office of district attorney. The jury had a right to look upon him especially as the representative of the law-abiding, law-enforcing citizens of that community. The appellee's attorney went too far; he said too much. It was calculated to dethrone the reason and equilibrium of the jury. We think this error in the trial court was so grave that there ought to be another trial of this cause on the question of damages.

If there was any error in the instructions to the jury on the question of damages, we think it was harmless. Possibly under the instructions given appellee the elements of damages were made to overlap each other, but it is hardly probable that the jury so understood the instructions. Perhaps on another trial appellee's instructions on damages should be revised with a view of avoiding that criticism.

Reversed and remanded for a new trial on the question of damages alone.

NOTE—*Meaning of "Hauled or Used on Its Line," as Used in the Safety Appliance Act.*—In addition to the cases reviewed in the reported opinion, attention is directed to that of Baltimore & O. R. Co. v. Hooven, 297 Fed. 919, decided by the Circuit Court of Appeals for the Sixth Circuit. In this case it was held that the Safety Appliance Act, making it unlawful for a common carrier to "haul or permit to be hauled, or used on its line," any car not equipped with certain required appliances, has no application to a locomotive temporarily withdrawn from service and undergoing minor repairs in a round house preparatory to early return to service. In this case the court said:

"The act forbids the 'use' or 'hauling on its line' of prescribed cars. Whatever ambiguity lies in the statute results from the susceptibility of the term 'use' to an interpretation equivalent in meaning to the terms 'employ' or 'engage,' or the phrase 'habitually use,' as distinguished from the term 'use' as implying actual present use. Having in mind the broad aims and purpose of the statute and its specific provisions, we think there can be no doubt as to the meaning of its prohibitory clause. The statute imposes an absolute liability on the carrier to equip its vehicles with safety appliances and to keep such appliances secure. The act of equipping the vehicle originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of law, and are not in our judgment acts which the law intends to penalize. The process of condition-

ing an engine and preserving it from deterioration through rust by spraying it with oil appears to be, so far as this record is concerned, the usual and necessary treatment of the engine during monthly inspection, contributing to the safety of the apparatus while in actual use. If during such treatment the safety appliances are rendered temporarily insecure by the presence of oil upon them, it does not seem to us to present a condition that comes within the purview of the act, when as in this case the engine is completely withdrawn from all relationship to the highways of interstate commerce, and from all connection with the movement of trains thereon.

"Another consideration also contributes to this conclusion. Assuming it to be the wise and humane purpose of the act to secure the utmost of safety to travelers and employees upon the highways of interstate commerce, whatever may be the source of the dangers which threaten it, it becomes the clear duty of the carrier in conformity with such purpose, as was suggested by this court (opinion of Judge Knappen, Southern Ry. Co. v. Snyder, 187 Fed. 492, at page 497, 109 C. C. A. 344), to exercise a high degree of diligence in discovering and repairing defects in its safety appliances and in withdrawing the car from commercial use while they exist. Such diligence seems also to be imposed on the carrier by the Boiler Inspection Act (Comp. St. § 8630 et seq.) and related statutes. Can it be said that it is the intention of the Safety Appliance Act to penalize such diligence by extending the absolute liability of the carrier through the period of replacement and repair, and reaching even a case where the insecure condition of the appliance which failed was the natural and temporary result of the reconditioning process? We think such contention untenable, unless supported by specific direction of the statute."

BOOK REVIEW

MIKELL—CASES ON CRIMINAL LAW

A new edition of Mikell's Cases on Criminal Law, by William E. Mikell, Dean of the Law School, University of Pennsylvania, has just been published by West Publishing Co., St. Paul, as one of the American Casebook Series. It is intended for use as a textbook in studying the common law principles of the criminal law.

In the selection of cases in this book the object has been to present the law as it is; to trace its growth to its present state; and to indicate, as far as possible by the most recent usable cases, its future development.

The foundation of the present book is a casebook published by the author in 1903, and a smaller volume prepared by him for the American Casebook Series in 1908. To the material contained in these two volumes has been added either in the text or notes those significant cases decided since 1908 which, in the judgment of the author, are fitted—or best fitted—for classroom discussion, regard being had to the limitation of space.

Certain cases contained in the former volumes which experience has shown were not particularly valuable in the development of the subject in the classroom, have been omitted from this book. Sixty cases, most of them recent ones, not in either of the other books, have been added.

The book contains about 800 pages, and is bound in dark green buckram.

WINFIELD—THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY

Percy H. Winfield, LL.D., Fellow and Law Lecturer of St. John's College, Cambridge, and of the Inner Temple, Barrister-at-law, is the author of a book just off the Harvard University press, Cambridge, Massachusetts, entitled as above. Dr. Winfield's book is based on a course of lectures delivered in the Law School of Harvard University during the spring of 1923. Writing primarily to provide a survey of sources and appraisal of the materials that must go before historical research on individual points, he has in addition shown us the way toward achievement of a general doctrinal history of our law and has done much pioneer work. Beyond its significance for the future of the Anglo-American legal history and its worth for the student of that history, the book will be of immediate practical value in the administration of justice. It now makes accessible a readable, reliable guide to the sources, which should preclude further resort to some questionable materials which have passed current even recently. Both teachers and students in our law schools, as well as practising lawyers interested in more than the business side of their day's work, will find Dr. Winfield's book stimulating, interesting and reliable.

The Justice of the Peace refused to hear the defence. "I don't want to listen to no defence. My mind's made up," he said. "He's guilty, and the sooner we get him in jail the better." But the lawyer for the defence told him he would have to listen to it anyway, as the law prescribed it as one of the duties of the office. And after having reluctantly permitted the defence to show their cause, the judge cried excitedly: "Isn't that funny? A little while ago the prosecution won. And now the defence wins. Prisoner discharged."

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

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Arizona 61, 67
Arkansas 1, 24, 43, 45, 47
California 3, 5, 41, 59, 82
Colorado 79, 95
Connecticut 39, 91
Georgia 51, 75, 93
Idaho 66
Illinois 40, 65, 81, 92
Kansas 25, 88
Kentucky 38, 56, 60
Louisiana 2, 33
Maine 89
Michigan 7, 9, 49, 71, 97
Minnesota 18, 58
Mississippi 8, 35
Missouri 22, 26, 29, 70
Nebraska 23
New Jersey 4, 10, 48, 74
New Mexico 85
New York 31, 32, 46, 57, 68, 77, 86, 96
North Carolina 12, 28, 83
Ohio 13, 50, 73, 78
Oklahoma 11, 94
South Dakota 36, 62, 87
Texas 30, 44, 76
Virginia 34, 63, 80, 90
U. S. C. C. A. 16, 17, 19, 21, 54, 55, 64, 84
U. S. D. C. 14, 15, 20, 52, 53
Washington 6, 69, 72
West Virginia 27
Wyoming 37, 42

1. **Adverse Possession**—Inclosed Land.—Where defendant had purchased lot inclosed partly by fence which took in 4 feet of plaintiff's adjoining lot, and defendant had extended fence by planting hedge to boundary of lot, also partly on plaintiff's lot, defendant mistakenly believing fence and hedge were on true dividing line, such possession was adverse, and defendant holding thereunder for more than 7 years had title.—Miller v. Fitzgerald, Ark., 275 S. W. 698.

2.——Prescription.—Defendant, claiming as purchaser under mortgage foreclosure, could not rely on 10 and 30-year prescription because of adverse possession of mortgagor, where there was no proof of his possession for 30 years, and his purchases of lands could not have been in good faith from vendor to whom he had just pretended to sell, nor from his son, who had only one-eighth interest in land.—Bell v. Bell, La., 105 So. 509.

3. **Assignments**—Guaranty of Lease.—Where guaranty of lease was not limited by its terms to original lessor, it was an assignable chose in action, and guarantors were not exonerated from liability by virtue of the assignment by one of original lessors to one of parties plaintiff.—Murphy v. Luthy Battery Co., Cal., 239 Pac. 341.

4. **Automobiles**—Degree of Care.—In action for injuries caused by motor truck, charge that man would be exercising one degree of care if he looked from one place, and he would be exercising another degree if he looked from another place, or if he did not look at all, held not erroneous, in view of testimony that defendant's truck was on wrong side of street, as declaring that a man would be exercising a certain degree of care even if he did not look at all.—Clemenshaw v. Rizzo, N. J., 130 Atl. 561.

5.——Duty of Pedestrian.—Pedestrian, traveling on public highway, is under no legal duty to look back or watch behind to see whether he is in danger of being struck or run down by vehicle approaching from rear.—Hatzakorzian v. Rucker-Fuller Desk Co., Cal., 239 Pac. 709.

6.——Intoxication.—Although negligence of driver of vehicle is not imputable to passenger, yet the conduct of a passenger in entering an automobile and continuing to ride therein, when he knew or must have known driver was intoxicated, establishes negligence barring recovery, and rule applies to a passenger in a vehicle for hire as well as guest.—Wayson v. Rainier Taxi Co., Wash., 239 Pac. 559.

7.——Lights.—Pub. Acts 1921, No. 126 (Comp. Laws Supp. 1922, § 4865 [7]), making it unlawful to drive a vehicle without a rear light from one hour after sunset to one hour before sunrise, fixes a time for displaying lights, regardless of darkness or weather conditions.—Gleason v. Lowe, Mich., 205 N. W. 199.

8.——Negligence.—Where a person, traveling on the proper side of the highway at the point of intersection with another highway in trying to avoid a collision at such intersection turned from the proper side of the highway to the opposite side for the purpose of avoiding a collision, he is not guilty of negligence solely by such act.—Ripley v. Wilson, Miss., 105 So. 476.

9.——Negligence of Passenger.—Rule requiring passenger in automobile to use reasonable care for his own safety does not apply, where he is sitting in back seat of crowded car, equipped with closed curtains, as it would were he in front seat with same opportunity to observe as, and in close communication with, driver.—June v. Grand Trunk Western Ry. Co., Mich., 205 N. W. 181.

10.——Owner's Liability.—Where testimony of the owner of an automobile to the effect that its negligent driver on a public highway was not such owner's servant, acting within the scope of the employment, is expressly contradicted or impeached by other evidence, or is of such a contradictory or incredible nature as to offer its own contradiction, held that the question of such relationship was properly submitted to the jury.—In re Caplin, N. J., 130 Atl. 526.

11.——Railroad Crossing.—While it cannot be said, as a matter of law, that, prior to the act of the Legislature (Sess. Laws 1925, p. 149, c. 101, approved March 18, 1925), requiring vehicles to stop before crossing steam or electric car tracks, except in incorporated cities having an ordinance governing such traffic, it is the duty of the driver of an automobile about to cross a railroad track, to stop, look, and listen, under all circumstances, nevertheless, where contributory negligence is set up as a defense, the question of whether or not, under the circumstances in the particular case as disclosed by the evidence, he should stop, is a matter for the jury to determine, and an unqualified instruction that it is "only" his duty to look and listen is error.—Gulf, C. & S. F. Ry. Co. v. Harpole, Okla., 239 Pac. 609.

12.——Sale of Title.—Motor Vehicle Registration Act does not prohibit sale or transfer of title of motor vehicle without transfer and delivery of certificate of registration of title, nor render such sale fraudulent or void, but is directed against those who violate act after sale or transfer is made.—Carolina Discount Corporation v. Landis Motor Co., N. C., 129 S. E. 414.

13.——"Theft."—Where an owner of an automobile executes a contract of sale for the car, helps the vendee change the license numbers, and, in pursuance of his contract of sale, transfers possession and title to vendee, who pays therefor with a forged check, such fraudulent transaction so perpetrated by the vendee does not constitute a "theft," within the terms of the policy.—Royal Ins. Co. v. Jack, Ohio, 148 N. E. 923.

14. **Bankruptcy**—Attorneys' Fees.—Under Bankruptcy Act, § 64(b), being Comp. St. § 9648, permitting payment of actual and necessary cost of preserving estate subsequent to filing of petition in bankruptcy, services of attorney, larger part of which were rendered prior to bankruptcy, and some of which, although rendered subsequent to bankruptcy, did not tend to preserve estate, did not constitute basis for claim against bankrupt's estate.—In re Cabel Upholstering Co., U. S. D. C., 6 F. (2d) 1019.

15.——Conditional Sale.—As against trustee, a conditional sales contract was not void because not filed until day after the filing of schedules in bankruptcy, under New Jersey Uniform Conditional Sales Act 1919, § 5, where schedules disclosed such contract, and there were no judgment or lien creditors, as the trustee acquired no rights before actual notice of the contract.—In re Golden Cruller & Doughnut Co., U. S. D. C., 6 F. (2d) 1015.

16.——Conversion.—Under Rev. St. § 720 (Comp. St. § 1242), the bankruptcy court is without jurisdiction to enjoin the institution in a state court of an action of conversion against the trustee in bankruptcy; jurisdiction of bankruptcy court under Bankruptcy Act, § 2, cl. 15 (Comp. St. § 9586), to protect itself in the possession of assets of bankrupt, in its actual custody and constructive possession, being limited to such cases as those in which it may be authorized by any law relating to proceedings in bankruptcy.—Petition of Schwartz, U. S. C. C. A., 7 F. (2d) 79.

17.——Dischargeable Debt.—Judgment obtained by judgment creditor of corporation against officer fraudulently misappropriating its money, for the purpose of making the corporation insolvent and unable to pay such judgment, was not a dischargeable debt, under Bankruptcy Act, § 17 (Comp. St. § 9601), excepting debts created by fraud, embezzlement, misappropriation, or defalcation, while acting as an "officer," as this includes officers of private corporations.—In re Metz, U. S. C. C. A., 6 F. (2d) 962.

18.——Lien.—The provisions of section 67, subd. (f), of the federal Bankruptcy Act of July 1, 1898 (U. S. Comp. St. 9651), whereby levies under execution or other liens, obtained within four months before filing of a petition in bankruptcy, are deemed void when the debtor is adjudged a bankrupt and the property passes to the trustee for the benefit of creditors, do not annul an execution lien, where the bankrupt's property does not pass to the trustee.—Swaney v. Hasara, Minn., 205 N. W. 274.

19.——Life Interest.—Under the law of Maryland, a will which left property in trust, income to be paid in equal parts to six children during their lifetime, or to issue of any child who should die before termination of the trust, with remainder over after the death of the last child, "the payments to be made by the trustees into the hands of him or her as the case may be personally," held not to create a spendthrift trust, and life interest of one of the sons passed to his trustee in bankruptcy.—Dudley v. Tucker, U. S. C. C. A., 7 F. (2d) 118.

20.——Reclaiming Goods.—Where bankrupt, at time goods were bought, was hopelessly insolvent and unable to pay for same, and such fact was known to its manager, but concealed from seller, it could not be said that bankrupt had reasonable expectation of paying for them, and hence its conduct was the legal equivalent of actual fraud, entitling seller to reclaim goods.—In re Whitewater Lumber Co., U. S. D. C., 7 F. (2d) 410.

21.——Reclamation Proceeding.—A foreign corporation, not licensed to do business in Michigan, may bring reclamation proceeding for property delivered to bankrupt under contract by which it retained title, subject to duty to repay so much of purchase price received as has not been counterbalanced by depreciation in the property.—Wilkin v. Heywood-Wakefield Co., U. S. C. C. A., 7 F. (2d) 115.

22. **Banks and Banking**—Authority of Cashier.—The act of a cashier in attempting to release a party to note payable to the bank without knowledge or consent of the board of directors was beyond the scope of his authority, and bank is not bound thereby.—Merchants' & Miners' Bank of Webb City v. Hille, Mo., 275 S. W. 560.

23.——Certificate of Deposit.—One cannot become an innocent holder, or purchaser, of a bank certificate of deposit, which has been unlawfully issued, let its form or its recitals be what they may, in the sense that such purchaser, or holder, can come within the protection of the bank depositors' guaranty law.—State v. Kilgore State Bank, Neb., 205 N. W. 297.

24.——Directors' Responsibility.—Test of responsibility of directors to stockholders for mismanagement of bank's affairs is whether they have exercised good faith and diligence, since mere exercise of poor judgment does not make them liable, and stockholders assume risk of losses occurring thereby.—Muller v. Planters' Bank & Trust Co., Ark., 275 S. W. 750.

25.——Dishonoring Checks.—In an action by a depositor to recover damages from a bank for refusal to honor his checks, the court permitted the plaintiff to introduce evidence that he had been refused loans by other banks, and that others had refused to cash his checks, without showing that the refusal of the other banks to make the loans, and others to cash his checks, was caused or influenced by the dishonor of the checks by the bank from which he sought damages. Held error.—Meinhart v. Farmers' State Bank, Kan., 239 Pac. 769.

26.——Draft.—Drawee bank held chargeable as trustee for proceeds of draft forwarded to it for collection and remittance which on insolvency of defendant pass to commissioner of finance impressed with same trust.—Bank of Poplar Bluff v. Millspaugh, Mo., 275 S. W. 579.

27.——Preferred Creditor.—Sovereignty of King at common law descended to state, and in view of Const. art. 2, § 2, providing that powers of government reside in all citizens of state, is entire, and indivisible, and county has no part thereof so as to give it preference as depositor in bank which became insolvent.—Calhoun County Court v. Mathews, W. Va., 129 S. E. 399.

28.——Safe Deposit Box.—In depositor's action against bank for value of bonds stolen from safety deposit box, evidence that bonds were stolen from vault of standard make, deemed reasonably safe by expert bankers, by burglars using high explosive, held to warrant granting of nonsuit on motion of bank.—Morgan v. Citizens' Bank, N. C., 129 S. E. 585.

29. **Bills and Notes**—Duress.—Threat to bring a civil suit by attachment which would disclose and be based at least in part on commission of felony by close relative of defendants is sufficient to sustain a plea of duress, as defense to action on note which they had indorsed.—Mississippi Valley Trust Co. v. Begley, Mo., 275 S. W. 540.

30.——Ownership of Certificate of Deposit.—That certificates of deposit were purchased at a discount of 10½ per cent, and the issuing bank was solvent, held not sufficient to excite suspicion and require inquiry as to the funds evidenced by them.—Security State Bank & T. Co. v. Merchants' & F. State Bank, Tex., 275 S. W. 721.

31.——Validity.—The single exception to rule that a negotiable instrument declared void by statute cannot be made valid by passing through channels of trade is through Banking Law, § 114, and federal statutes (U. S. Comp. St. § 9758 et seq.) applicable to national banks, providing that bank which purchases in good faith before maturity note usurious in inception takes it free from defense of usury.—Weissman v. Naitove, N. Y., 211 N. Y. S. 740.

32. **Brokers**—Loan on Real Property.—Penal Law, § 2039, making it a misdemeanor for anyone to apply for a loan on real property without written authority from the owner, held unconstitutional.—Keller v. Jamaica Motor Service Corporation, N. Y., 211 N. Y. S. 578.

33. **Carriers of Passengers** — Alighting. — Where water board negligently placed pipes in dangerous proximity to car track, as a result of which passenger preparing to alight was injured, such negligence, concurring with that of street car company, was proximate cause of injury, since but for presence of pipe passage of street car would have been clear and safe; hence there was no reason for finding that negligence of street car company was sole and proximate cause of injury or vice versa.—Shalley v. New Orleans Public Service, La., 105 So. 606.

34.——Jitney Driver.—Jitney driver, as common carrier, owes passenger utmost care, diligence, and foresight in operation and management of his vehicle and is liable if guilty of negligence in slightest degree, whereby passenger, not himself negligent, is injured.—Riggsby v. Tritton, Va., 129 S. E. 493.

35.——Loss of Baggage.—Where a railroad company accepts a trunk delivered to it by a drayman for a person intending to take a train a few hours later, and stores it in its depot, and it is taken therefrom by third parties, and is not available to the person intendng to take passage on its trains when such person comes to take passage, and on account of such loss of the trunk the passenger does not buy a ticket and take passage, the carrier is a bailee for hire, and not a gratuitous bailee.—New Orleans & N. E. R. Co. v. Thigpen, Miss., 105 So. 481.

36. **Contracts**—Option Contract.—Where an option contract for sale of mining property provided that failure to make payments worked forfeiture, a failure to make second payment worked forfeiture of contract, and such payment could not be recovered, even though option was not surrendered at that time.—New Reliance Gold-Mining Co. v. Ofer Gold-Mining Co., S. D., 205 N. W. 377.

37. **Constitutional Law**—Hours of Service.—Comp. St. 1920, § 4308, declaring eight hours to constitute a lawful day's work on public works, held a valid exercise of legislative power, and to that extent not violative of state Const. art. 1, § 6, and federal Const. Amend. 14, providing that no person shall be deprived of life, liberty, or property without due process of law.—State v. A. H. Read Co., Wyo., 240 Pac. 208.

38. **Corporations** — Authority to Sell.—Neither president nor other officer may sell corporate business and property in its entirety, in the absence of specifically conferred authority to sell.—Irvine Toll Bridge Co. v. Estill County, Ky., 275 S. W. 635.

39.——Repurchase of Stock.—Plaintiff cannot recover on count setting forth an agreement by corporation to repurchase its stock; such agreement being ultra vires and illegal as not within provisions of Gen. St. 1918, § 3429, providing methods by which corporation may hold its own stock.—Pothier v. Reid Air Spring Co., Conn., 130 Atl. 383.

40.——Surrender of Stock.—Where stock, purchased from seller who did not comply with Securities Law, was later surrendered for other stock, tender of stock last purchased held, to support suit under Securities Law, § 37, to recover price paid for stock originally purchased.—Puntenney v. Wildeman & Co., Ill., 149 N. E. 2.

41. **Electricity**—Negligence.—In an action for death caused by unguarded high voltage wires of defendant, it was a question of fact for the jury whether warning signs posted on the posts 10 feet from the wires was sufficient warning, and it was therefore proper for the court to submit the question of negligence to the jury.—Fike v. San Joaquin Light & Power Corporation, Cal., 239 Pac. 344.

42. **Homicide** — Carelessness. — Carelessness by reason of driving at a speed that is unreasonable or such that is likely to endanger life or limb is not necessarily criminal carelessness, within the meaning of Comp. St. 1920, § 7070, providing for punishment for manslaughter.—State v. McComb, Wyo., 239 Pac. 526.

43. **Innkeepers**—Bill of Employees.—Crawford & Moses' Dig. §§ 5571, 5572, declaring it offense punishable by fine or imprisonment to obtain accommodation at hotel, boarding or eating house with intent to defraud owner, applies only to persons obtaining food or lodging for themselves, and one failing to pay board bill of employees at boarding house is not guilty of violation of statute, since such construction would render it unconstitutional under Const. art. 2, § 16, prohibiting imprisonment for debt.—Garrett v. State, Ark., 275 S. W. 902.

44. **Insurance**—"Change of Occupation."—Change in name of employment of insured, which in nowise increased hazard thereof, nor any risk of loss to insurer, is not, in legal contemplation, such "change of occupation" as permits insurer to reduce its liability thereunder.—Business Men's Assur. Co. of America v. Bradley, Tex., 275 S. W. 622.

45.——Incontestable Clause.—Two-year incontestable clause in life insurance policy held not to exclude defense of failure to furnish proof of loss, since such defense is not a contest of policy itself, but an assertion by way of defense of a failure to perform condition precedent to recovery.—Illinois Bankers' Life Ass'n v. Byassee, Ark., 275 S. W. 519.

46.——Murder of Beneficiary.—Where life policy was payable to wife of insured, and, if she died before insured, to insured's estate, and insured killed his wife, for which he was executed, his executor was not entitled to recover on policy as matter of public policy, regardless of Penal Law, § 5.2, prohibiting forfeiture of property for conviction for crime, and section 2301, providing that no forfeiture is imposed for suicide.—Smith v. Metropolitan Life Ins. Co., N. Y., 211 N. Y. S. 755.

47.——Proof of Loss.—Letter, written by insurer denying liability on life insurance policy, did not constitute a waiver of proof of loss, where time for such proof had already expired.—Illinois Bankers Life Ass'n v. Byassee, Ark., 275 S. W. 519.

48.——Representations.—Representations as to applicant's employment and as to diseases which he has had, unless fraudulently made, do not avoid policy, but, if willfully untrue, are fraudulent and will avoid policy.—Woynarowski v. Metropolitan Life Ins. Co., N. J., 130 Atl. 544.

49.——Settlement by Adjuster.—Where insurance adjuster, after a fire loss, told insured that company would be liable for a specified sum and no more, but insured demanded entire amount of policy, and on threat to sue was told to go ahead, held that adjusters had authority to bind company by a settlement, by limiting their liability and by waiving right to appraisal.—Maki v. Commonwealth Ins. Co., Mich., 205 N. W. 83.

50.——"Theft."—A policy of insurance was issued, indemnifying the owner of an automobile against loss by "theft, robbery, and pilferage." In construing the term "theft," it should be given the usual meaning and understanding employed by persons in the ordinary walks of life.—Royal Ins. Co. v. Jack, Ohio, 148 N. E. 923.

51.——Value of Automobile.—In action on policy insuring new automobile from destruction by fire, there being no evidence from which jury could arrive at value of automobile at time of its destruction 9 months after issuance of policy, verdict for face of policy was unauthorized.—Mechanics' Ins. Co. of Philadelphia v. Teat, Ga., 129 S. E. 554.

52.——War Risk Policy.—Construction by director of statutory contingency of "total permanent disability," entitling veteran to payment of policy of war risk insurance, to mean impairment of mind or body, which would render average man incapable of following continuously substantially gainful occupation, and which it is reasonably certain would continue throughout life of insured is erroneous; proper test in each case depending on its own facts.—Wills v. United States, U. S. D. C., 7 F. (2d) 137.

53. **Intoxicating Liquors**—Denatured Alcohol.—Denial of the right to have a permit to use or to purchase specially denatured alcohol under National Prohibition Law, tit. 2, §§ 5, 6 (Comp. St. Ann. Supp. 1923, §§ 10138½bb, 10138½c), without a hearing, is not due process of law.—Gautieri v. Sheldon, U. S. D. C., 7 F. (2d) 408.

54.——Druggists.—In prosecution of druggist for possession of liquor in violation of Volstead Act, and holding liquors for sale contrary to regulations and his permit, a single sale may be enough to show that it was an instance of habitual practice, sufficient to justify finding that whole stock is held for illicit sale.—Steckler v. United States, U. S. C. C. A., 7 F. (2d) 59.

55.——Fourth and Fifth Amendments.—Const. U. S. Amends. 4, 5, have no application, where seizure of liquor without search warrant was by a municipal police officer.—Katz v. United States, U. S. C. C. A., 7 F. (2d) 67.

56.——Path.—In a prosecution for manufacturing whisky, conviction cannot be sustained where the only evidence connecting accused with possession of still was that a path could be followed from his house to the still.—McCall v. Commonwealth, Ky., 275 S. W. 807.

57. **Landlord and Tenant**—Damages by Steam.—Where defendant's janitor heard steam escaping into plaintiff's apartment, fact that he did not turn it off until usual time did not render defendant liable for damages caused by steam, in absence of showing whether furnishings were damaged before or after janitor knew that steam was escaping.—Radice v. Ensidler, N. Y., 211 N. Y. S. 570.

58.——Licenses—"Investment Contract."—A contract, termed an "operator's agreement," whereby the operator advanced money and furnished services, for which he was to be paid, and whereby he was to have a share of profits, and eventually stock, in a corporation in process of organization to operate a bus line, was an investment contract within Gen. St. 1923, § 3977 et seq., the "Blue Sky" Law.—State v. Bushard, Minn., 205 N. W. 370.

59. **Master and Servant**—Injury Before Employment.—One injured on hotel grounds before employment in hotel began was not employee at time of injury, which therefore did not arise out of or in course of employment, though she was residing in hotel at owner's invitation.—Powers v. Raymond, Cal., 239 Pac. 1069.

60. **Mines and Miners**—Lien for Wages.—Coal-mining company had suspended operations of its mines within Ky. St. § 2490, where its employes had quit when their past-due wages were not paid, and hence employes were entitled to a superior lien on company's property to secure their wages earned within six months next before commencement of action, as provided by section 2488, since it was instituted by them within less than 60 days from date of suspension of business by coal company, as provided by section 2491, authorizing joining of several employes in a single action for enforcement of such a lien.—Producers Coal Co. v. Barnaby, Ky., 275 S. W. 625.

61.——Location.—Plaintiff having attempted to relocate mining claim on theory that assessment work had not been done, with full knowledge of the boundaries of the claim, was in no position to claim forfeiture because of defendants' failure to properly post notices of their amended location.—Smart v. Staunton, Ariz., 239 Pac. 514.

62.——Option Contract.—Option contract for sale of mining property, which provided for deferred payments to draw interest, and that failure to make payments worked forfeiture without damages, held to require payment of interest on deferred payments only in case contract was not forfeited.—New Reliance Gold-Mining Co. v. Ofer Gold-Mining Co., S. D., 205 N. W. 377.

63.——Wear and Tear.—In action involving mining lease, in which there was evidence that it was usual for mine cars to be subjected to rough treatment, and that cars leased had been damaged to certain extent from wrecking or violent means, instruction that lessee had duty under lease requiring property to be returned in good shape, usual wear and tear excepted, to return property in good repair, excepting for usual wear and tear, and leaving meaning of such words to jury, in light of evidence, and refusing instruction defining "usual wear and tear excepted" to mean that lessee should be excused from duty of returning property in good repair only to extent it had deteriorated from natural causes and from reasonable and proper use in conduct of operation, was not error.—Roberts Coal Co. v. Corder Coal Co., Va., 129 S. E. 341.

64. **Monopolies**—Longshoremen's Association.—Allegations of illegal combination between ship owners and operators controlling nearly all port's longshore and stevedoring business, that restrictions and interferences were by establishing water front employers' association, establishing a hiring hall, making rules and regulations governing employment and conduct of longshoremen, establishing registration system, fixing and enforcing uniform wages for longshoremen, and limiting employment to favored longshoremen, and refusing to employ any one discharged by other defendants, held not to show impeding of commerce or violation of Sherman Anti-Trust Law or Clayton Act, or that defendants had other purpose than to regulate fairly transaction of their business.—Tilbury v. Oregon Stevedoring Co., U. S. C. C. A., 7 F. (2d) 1.

65. **Mortgages**—Lodge Money.—Grand Lodge trustee, who was authorized to loan its money on any security he saw fit, and dealt with it as his own, accounting to lodge for amount received and interest realized, was legal owner of notes taken by him for loan of such money, and could file bill in his name to foreclose trust deed securing them, and appoint receiver to collect rents pending suit, as authorized by deed on default in payment of any part of debt, he being trustee of express trust, with active duties, and lodge not a necessary, though proper, party to suit.—Hirsh v. Arnold, Ill. 148 N. E. 882.

66. **Municipal Corporations**—Defective Street.—The use of a street, sidewalk, or crossing, known to be defective or obstructed, which is not so obviously dangerous that no prudent person would attempt to use it, is not negligence as a matter of law, which will bar a recovery for an injury caused by the defect or obstruction.—Osier v. Consumers' Co., Idaho, 239 Pac. 735.

67.——Garbage.—A city is not liable for negligence occurring in the collection of garbage, such work being governmental in its nature, in which it has the exemptions of the sovereignty.—Jones v. City of Phoenix, Ariz., 239 Pac. 1030.

68.——Municipal Radio.—As use of municipally owned radio station, constructed as adjunct to police and fire departments, in dissemination of private political utterances of mayor or others, is not use as adjunct to purpose of its creation, injunction restraining such use will be continued.—Fletcher v. Hylan, N. Y., 211 N. Y. S. 727.

69.——Negligence.—In an action for injuries from falling into unguarded hatchway on city street, whether city was negligent, on account of hatchway being open without man present to warn persons of danger, as required by ordinance, was question for jury.—Tubb v. City of Seattle, Wash., 239 Pac. 1009.

70.——Notice of Injury.—Generally, to excuse person injured from giving notice to municipality of injury within time required by Rev. St. 1919, § 8182, it must be shown that there is such incapacity, physical or mental, as to make it reasonably impossible for injured person to serve notice, or procure it to be served, within such time.—Randolph v. City of Springfield, Mo., 275 S. W. 567.

71.——Notice of Injury.—City, which has taken affirmative action on notice of claim for personal injuries and disallowed claim, cannot, in suit thereon, insist on insufficiency of notice.—Nevala v. City of Ironwood, Mich., 205 N. W. 93.

72.——Polluted Water.—In action for death from drinking polluted water furnished by city, complaint held to state a cause of action as against objection that it failed to allege specific cause of pollution, or that after water became polluted city failed to notify users to boil the water, and that it failed to specify cause or place of pollution.—Aronson v. City of Everett, Wash., 239 Pac. 1011.

73.——Zoning Ordinance.—An ordinance enacted by a municipality under article XVIII, section 3, of the Ohio Constitution, and under sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to a comprehensive plan which, in the interest of the public health, public safety, and public morals, regulates the uses and the location of buildings and other structures and of premises to be used for trade, industry, residence, or other specific uses, the height, bulk, or location of buildings and other structures thereafter to be erected or altered including the percentage of lot occupancy, set back building lines, and the area of yards, courts, and other spaces, and for such purpose divides the city into zones or districts of such number, shape, and area as are suited to carry out such purposes, and provides a method of administration therefor, and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment.—Pritz v. Messer, Ohio, 149 N. E. 30.

74.——Zoning Ordinance.—Zoning ordinance providing "no part of a building shall be higher above the curb level than the distance it sets back from the street line * * * and the front yard set-back distance to the main front wall shall not be less than 25 feet, except that on corner lot set-back distance from one street line may be reduced to not less than 15 feet, held not a valid exercise of police power but an attempted taking of property for public purposes without just compensation.—Heller v. Village of South Orange, N. J., 130 Atl. 534.

75. **Negligence**—Attractive Nuisance.—A three-year-old child, injured while playing on a pile of cross-ties belonging to a railroad company and on its right of way, cannot recover from the company on the theory that the cross-ties constituted such an attractive nuisance as to render the defendant liable under the doctrine of the "turntable cases."—Macon, D. & S. R. Co. v. Jordan, Ga., 129 S. E. 443.

76.——Escaping Gas.—Evidence held sufficient to sustain finding the codefendant gas company negligently permitted gas to escape from its main, and that such gas emerged from the earth and passed into deceased's room, and that such negligence was the proximate cause of his death arising from injuries received in an explosion when he struck a match to light a gas stove in his room.—Southwestern Gas, Light & Power Co. v. Jay, Tex., 275 S. W. 735.

77.——Window Washer. — Decedent's employer contracted with defendant for cleaning latter's windows. Window from which decedent fell was not equipped with hooks for safety belt. Evidence, equally consistent with theory that decedent fell while he was getting out of window to sill, either as result of his carelessness or accidental slipping, which caused him to fall before attaching safety belt to hooks, had they been there, held not to make case for jury of defendant's negligence.—Dougherty v. Pratt Institute, N. Y., 211 N. Y. S. 708.

78. **Nuisance**—Filling Station.—Hazard of explosion and fire from gasoline filling station, erected according to modern science and engineering, is not of such magnitude as to make its installation a nuisance for that reason alone.—Powell v. Craig, Ohio, 148 N. E. 607.

79. **Principal and Agent**—Authority of Agent — Salesman of secondhand automobiles, having authority to fix prices and terms of payment, has not ipso facto authority to warrant or authority from which authority to warrant may be inferred.—Moore v. Switzer, Col., 239 Pac. 874.

80. **Railroads** — Crossing. — Erection of gates, gongs or other devices at railroad crossings to warn travelers of approaching trains does not excuse traveler from exercising ordinary care and caution, but, generally, where gate is open or gong silent, same degree of care is not required as if there were no such invitation to cross; question of contributory negligence, in such cases, usually being for jury.—Etheridge v. Norfolk Southern R. C., Va., 129 S. E. 680.

81.——Negligence of Child.—In view of statute declaring child under age of 10 years doli incapax, statute making it a misdemeanor to climb on railroad car without permission has no application to child under 10 years of age.—Maskaliunas v. Chicago & W. I. R. Co., Ill., 149 N. E. 23.

82. **Sales**—"Suitable for Eastern Shipment."—Term "suitable for Eastern shipment," as used in contract for sale of grapes, has a definite meaning in the grape shipping industry, indicating a condition which will permit grapes to be shipped to, and arrive at, Eastern points in a sound condition allowing normal time for transportation.—Gibbs v. Hersman, Cal., 239 Pac. 350.

83.——Warranty.—If contents of packages of fertilizer were not of analysis guaranteed thereon, note given as purchase price therefor was without consideration.—Swift & Co. v. Etheridge, N. C., 129 S. E. 453.

84. **Searches and Seizures**—Unreasonable Search.—Const. Amend. 4, does not protect citizens against unreasonable searches by state government and its agencies.—Schroeder v. United States, U. S. C. C. A., 7 F. (2d) 60.

85. **Trespass**—Posted Mining Property.—Mining property posted by the lessee and operator under sections 3516 and 3517, Code of 1915, included a camp with dwelling houses occupied by the employees as tenants, for ingress and egress to and from which the streets of the camp were necessarily used. In the absence of proof of restriction upon the right of the tenants to use the streets one using them to make delivery of goods which the tenants have ordered from him does not incur the statutory penalty for entering such posted property without permission.—State v. Vincioni N. M., 239 Pac. 281.

86. **Trusts and Trustees**—"Charitable Trust."—Trust for promotion of research in agricultural chemistry held for public purpose and to constitute a "charitable trust," within Personal Property Law, § 12, and Real Property Law, § 113, providing that such trust shall not be deemed invalid by reason of indefiniteness or uncertainty of persons designated as beneficiaries.—In re Frasch's Estate, N. Y., 211 N. Y. S. 635.

87. **Vendor and Purchaser**—"Dependent Covenants."—Where, in land contract, defendant is to make payments on furnishing of abstract by plaintiff showing good and merchantable title, the covenants therein are "dependent covenants" and plaintiff must show that he was ready and willing to perform before defendant was in default by Rev. Code 1919, § 2915.—Moter v. Hershey, S. D., 205 N. W. 239.

88. **Wills**—"As Long as Life Doth Last."—The phrase "as long as life doth last," in a will devising and bequeathing property to a person named, is tantamount to "forever."—In re Brown, Kan., 239 Pac. 747.

89. **Workmen's Compensation**—Arising Out of Employment.—Where employee was riding on one of company's trucks with knowledge and consent of company, while going to lunch, and was injured in alighting therefrom, held that there was a causal connection between conditions under which employee worked and injury received, so as to make injury "arise out of" employment.—Beers' Case, Me., 130 Atl. 350.

90.——Course of Employment.—Death of employee killed while using railroad bridge over river on way home 15 minutes after he had left place of employment held not to have arisen out of and "in course of his employment" so as to be compensable under Workmen's Compensation Act, § 2 (d); there being at least two other ways of egress from place of employment.—Kent v. Virginia-Carolina Chemical Co., Va., 129 S. E. 330.

91.——Course of Employment.—In proceeding under Workmen's Compensation Act for death of husband, finding that use of path by deceased over tracks as approach to plant was a risk annexed by the conduct of the parties as an incident to employment, and hence injuries sustained on crossing such tracks arose out of and in course of decedent's employment, was proper, in view of fact that employer had never objected to use of path and contemplated its use.—Corvi v. Stiles & Reynolds Brick Co., Conn., 130 Atl. 674.

92.——Course of Employment.—Where mine examiner left place where his duties required him to go, and went to motor shed, where he was not supposed to go, and undertook to operate dangerous machine, which rules and instructions of employer forbade him to use or attempt to operate, he voluntarily went outside reasonable sphere of employment, and put himself beyond protection of Compensation Act.—Lumaghi Coal Co. v. Industrial Commission, Ill., 149 N. E. 11.

93.——Course of Employment. — Where blacksmith's helper assisted blacksmith in making hinges for helper's own use, which blacksmith made at his request, and where it was custom of company to do work for its employees, and helper had, under instructions from blacksmith, performed such work for other employees, inference was authorized that helper, when helping to make hinges, notwithstanding fact that work was in violation of company's rule, no order therefor having been obtained, performed work as "employee" acting "in course of employment," in injury sustained by him while so working was compensable within Workmen's Compensation Act.—Banks v. State, Ga., 129 S. E. 667.

94.——Driving Own Car.—One who sustains an injury while driving his own automobile, who has been employed as a collector, is not entitled to recover compensation from his employer under the "Workmen's Compensation Act."—Crawford v. State Industrial Commission, Okla., 239 Pac. 575.

95.——Mail Carrier.—Death of employee of contractor carrying United States mails, caused by accidental discharge of rifle, carried for protection, when he took it out of his truck, which he had parked in front of his home for the night, held to "arise out of and in the course of his employment."—Comstock v. Bivens, Col., 239 Pac. 869.

96.——Notice of Death.—Under Workmen's Compensation Law, § 18, making fact that employer has not been prejudiced by failure to give him written notice of employee's death excuse for such failure, fact that employer had knowledge of employee's death is no excuse for failure to furnish written notice, regardless of finding by Industrial Board that employer was not prejudiced because it had knowledge of death.—Harvey v. Knickerbocker Slate Co., N. Y., 211 N. Y. S. 672.

97.——Physical Examination.—Where employe receiving compensation for injuries failed to report for physical examination at expense of employer, when summoned in accordance with Workmen's Compensation Act, pt. 2, § 19, due to fact that he had been deported from the country on account of unlawful entry, employer was entitled to suspension of award."—Sauch v. Studebaker Corporation, Mich., 205 N. W. 120.